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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 368

MICHIGAN GAS AND ELECTRIC COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION, MICHIGAN WISCONSIN PIPE LINE COMPANY, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Michigan Gas and Electric Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on April 20, 1961.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, pp. 1a-5a) is reported at 290 F. 2d 374. The opinion of the Federal Power Commission, issued October 31, 1959 (R. 339-397) is reported at 22 F.P.C. 775; the Commission's order denying rehearing, issued December 29, 1959 (R. 428-447) is reported at 22 F.P.C. 1157.

JURISDICTION

The judgment of the Court of Appeals was entered on April 20, 1961 (App. B, *infra*, p. 1b). A petition for rehearing, timely filed was denied on June 1, 1961 (App. C, *infra*, p. 1c). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether the responsibility of the Federal Power Commission to prevent undue discrimination under Section 4(b) of the Natural Gas Act is properly discharged when, in the presence of such discrimination, the Commission restricts its consideration of means for the elimination thereof only to the suggestions made by those affected thereby and, upon rejection of these suggestions, does not undertake itself to devise means for its elimination, thereby leaving the unlawful discrimination outstanding and operative.

STATUTE INVOLVED

Section 4 of the Natural Gas Act, 52 Stat. 821, 822 (1938) provides in pertinent part:

> (b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

STATEMENT

Petitioner, Michigan Gas and Electric Company (Michigan Gas), is a Michigan corporation engaged in the business of distributing gas and electricity to consumers in various communities in the State of Michigan (R. 151-152). For at least a half century, Michigan Gas has been dis-

tributing manufactured gas in the Upper Peninsula of Michigan.[1] Michigan Gas at present distributes manufactured gas in three Upper Peninsula communities of Marquette, Negaunee, and Ishpeming (R. 152-153) and has franchises to distribute natural gas there and in the four communities of Gladstone, Kingsford, Norway, and Iron Mountain (R. 153-155).

Michigan Gas proposes to distribute natural gas in the three communities now receiving manufactured gas as well as in the four communities which are presently without any type of gas service. In addition, Michigan Gas will sell natural gas to the City of Escanaba,[2] for resale; to Cleveland Cliffs Iron Company (Cleveland Cliffs), the largest independent producer of iron ore in the United States, for use in connection with a process for upgrading low-grade iron ore; and to other industrial users on a firm and interruptible basis (R. 20-23, 153-154).

The Upper Peninsula, which consists of Michigan's fifteen northernmost counties,[3] is one of the few remaining areas in the country without the benefits and advantages of natural gas. Although it has bountiful natural resources of timber, iron ore, copper, and productive soil as well as unlimited supplies of chemically pure water (R. 122), the Upper Peninsula at present is an economically depressed

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[1] In addition, in the southwestern or Lower Peninsula area of Michigan, Michigan Gas serves electricity in a four-county area through an integrated electric transmission system and natural gas to fourteen communities (R. 151-152), purchasing its entire natural gas requirements therefor from Michigan Wisconsin Pipe Line Company (R. 152).

[2] The City of Escanaba presently operates a municipally-owned manufactured-gas distribution system.

[3] Bounded on the south by the State of Wisconsin and on all other sides by Lakes Superior, Huron, and Michigan, and connecting waters (R. 122).

area and has so been declared by the Federal Government.[4] At present, the Upper Peninsula is primarily a one-industry economy, i.e., the iron ore mining industry which is dependent upon low-grade iron ore and, consequently, is suffering seriously from the severe competition of extremely high-grade iron ore imported from abroad and domestic ores developed in other regions in the Lake Superior district, particularly the Mesabi range (R. 21-22).

The availability of competitively-priced natural gas would greatly stimulate the growth and industrial advancement of the Upper Peninsula. In addition to making this premium fuel available to the householder, it would facilitate the development of the area's vast reserves of low-grade iron ore on a basis competitive with the foreign ores and ores from the Mesabi range (R. 21-25, 125, 126-127). Recent advances in technology have developed methods for the "beneficiation" of the low-grade ore and the "pelletizing" of the resulting iron particles into small balls of high iron content (R. 21-22, 125).[5] Heat is an essential element of the process and inasmuch as fundamental requisites of these processes are control of heat and freedom from impurities, such as sulphur (R. 21-24), natural gas with these special properties is the ideal fuel.

Competitively-priced natural gas also would provide a strong impetus in the revitalization of the forest products

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[4] Bureau of Employment Security, U. S. Department of Labor, *Area Labor Market Trends* (June, 1961, Supplement), pp. 13, 15.

[5] The reserves of high-grade iron ore in the Upper Peninsula "are now depleted to a large extent, or are too expensive to extract by underground mining methods" (R. 21). There remain, however, tremendous reserves of low-grade iron ore (R. 21, 125). To compete with the foreign, high-grade iron ores and upgraded low-grade ores of the Mesabi range, the iron ore industry of the Upper Peninsula has been compelled to develop processes to convert the low-grade ores into a high-grade product of comparable quality and price (R. 21-22).

industry, where it is needed in connection with the various essential drying processes, and would be of substantial assistance in the rebirth of copper mining (one company having indicated its ability to use 7 million cubic feet of gas per day (R. 124-125). Coupled with the further attraction of new industry resulting from the availability of natural gas (R. 126-127), this serves to diversify the economy of the Upper Peninsula and release it from its virtual dependence on the economic fortunes of a single industry. The resulting broader and more healthy economic base with its concomitant improvement in jobs and wages for the residents of the area would markedly enhance their economic well-being.[6]

In view of the Upper Peninsula's needs and industrial potential, Michigan Gas, at substantial expense since at

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[6] As summarized by the Michigan Public Service Commission in supporting Michigan Gas' efforts to secure natural gas for the Upper Peninsula in the Commission proceeding (R. 159):

> The vast area known as the Upper Peninsula of Michigan and particularly the communities above named [i.e., the communities to which Michigan Gas would serve natural gas], have an economic potential which has never been achieved. It is the considered opinion of the Michigan Commission, founded upon long and careful observation of utility operations in the Upper Peninsula, that a primary reason for this economic retardation is a shortage of sources of energy, including the complete lack of any natural gas service.
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> * * * *
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> The introduction of natural gas to the Upper Peninsula would be an invaluable aid to the fulfillment of the promising future which beckons the Upper Peninsula. This source of energy would assist in retaining present industry and promoting the growth thereof as well as induce new industry to locate in the region. The Michigan Commission believes the foregoing to be an outstanding example of the public interest to be served pursuant to the provisions of the Natural Gas Act.

least 1955 and despite early pre-emptory rebuffs by Michigan Wisconsin Pipe Line Company (Mich Wis), has been vigorously seeking to obtain natural gas for the Upper Peninsula (R. 156-158, 160-161). As a result, the Federal Power Commission (Commission), in denying in 1958 competing natural gas pipe line company applications for authority to serve the central Wisconsin area (but not the Upper Peninsula), stated that it would expect new applications also to make provision for a gas supply for the Upper Peninsula. See *American Louisiana Pipe Line Company, et al.*, 20 F.P.C. 575, 593 (1958).

Thereafter, having agreed to purchase Canadian gas from Midwestern Gas Transmission Company (Midwestern) for service to central Wisconsin, Mich Wis entered into negotiations with Michigan Gas for the sale of gas to Michigan Gas for the Upper Peninsula (R. 166-167). Mich Wis offered to sell gas to Michigan Gas for the Upper Peninsula at an average price of 46 cents per Mcf (R. 167), and to construct the necessary branch-line facilities from Menominee, Michigan, into the Upper Peninsula in order to provide *city-gate* service, i.e., delivery at the outskirts of the various communities and locations to be served by Michigan Gas (R. 55-56, 166-167, 275-282).

When these negotiations were on the verge of successful completion, however, Mich Wis abruptly withdrew its offer (R. 167-168) and instead applied to the Commission for authority to sell the gas for the Upper Peninsula to Michigan Consolidated Gas Company (Consolidated), a sister company in the American Natural Gas System, with delivery of the gas to take place at Menominee, Michigan, many miles away from the Upper Peninsula markets.[7] Consoli-

[7] Consolidated had never previously manifested any interest in the Upper Peninsula (R. 128, 158, 162, 168). It had no properties or operations there and its principal market area is in Detroit, some 400 miles away.

Mich Wis' sudden termination of its negotiations with Michigan Gas and injection of Consolidated, its sister com-

dated, in turn, would construct and operate the entire branch-line facilities from Menominee, north to the town borders of the communities in the Upper Peninsula. In addition, Consolidated would sell gas to Michigan Gas only for the firm requirements of the seven communities which it is franchised to serve (*supra*, p. 3). Consolidated itself would sell gas to the City of Escanaba and Cleveland Cliffs (R. 10-11). Consolidated proposed to charge Cleveland Cliffs 52 cents per Mcf and Escanaba and Michigan Gas 70 cents per Mcf (R. 13).[5]

Michigan Gas opposed this proposal. In addition to urging that it, rather than Consolidated, should serve the Upper Peninsula, Michigan Gas asserted that the terms of Mich Wis' proposal resulted in unlawful discrimination

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pany, is explicable as to Mich Wis only as an effort to insulate itself from its established branch-line extension practice, *infra*, pp. 8-9 (R. 175). From Consolidated's viewpoint, if its rates for service to the Upper Peninsula, resulting from the burden of the entire cost of the branch lines were too high, and made the project infeasible, Consolidated stood to gain a substantial volume of gas needed for its Detroit market, a need which was particularly acute in view of Consolidated's loss of gas as a result of the Commission's authorization to Panhandle Eastern Pipe Line Company to abandon service to Consolidated (*Michigan Consolidated Gas Company* v. *Federal Power Commission*, 283 F. 2d 204 (1960), certiorari denied, 364 U. S. 913 (1960)). Consolidated's agreement with Mich Wis provided that Consolidated could purchase for its Detroit market all of the gas destined for the Upper Peninsula if that project failed (R. 219; see, also, R. 169).

[5] These rates were not, and could not be, supported on the basis of cost of service (R. 94-97). They were so fixed by Consolidated on the basis that it needed an average of 58 cents per Mcf from the total sales in the Upper Peninsula, with the price Cleveland Cliffs being willing to pay determining the price to be exacted from Michigan Gas and Escanaba (R. 96, 169). With the price to Cleveland Cliffs at 52 cents per Mcf—6 cents per Mcf below the average claimed to be needed—the price to Michigan Gas and Escanaba, based on the volumes of gas involved, became 70 cents per Mcf—12 cents above the average.

prohibited by Section 4(b) of the Natural Gas Act, irrespective of whether the gas was allocated to Consolidated or Michigan Gas. Under Mich Wis' proposal, the Upper Peninsula markets would bear through rates the entire cost of the branch line from the pipeline delivery point (Menominee) to points of delivery in the Upper Peninsula[9] and at the same time pay Mich Wis the same rate for such pipeline delivery that all other customers pay for delivery over branch lines constructed by Mich Wis in accordance with its branch-line extension practice. Under this practice, when the branch line is regarded as part of a "project", Mich Wis constructs it all the way to the city gate and provides city-gate delivery; otherwise, Mich Wis constructs the line part of the way to the city gate as determined by its so-called "10-cent" formula and provides delivery at the point where Mich Wis' construction terminates.[10] The costs incurred by Mich Wis in constructing

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[9] Michigan Gas also asserted and demonstrated at the Commission hearings, that the rate proposed by Consolidated, resulting from the imposition of the complete burden of the costs of the branch-line facilities from Menominee upon the Upper Peninsula, economically precluded the purchase of gas from Consolidated (R. 171). Michigan Gas' return under the Mich Wis-Consolidated proposal, after five years of natural gas operations, would be less than the costs Michigan Gas would have to pay to raise the capital to build the distribution systems in the communities to be served (R. 171). Additionally, under the Mich Wis-Consolidated proposal natural gas would not fulfill its necessary purpose. At the 70 cents per Mcf rate, there could be no development of the industrial potential of the Upper Peninsula—either firm or interruptible (R. 171).

[10] Under the "10-cent" formula, the investment Mich Wis is required to make in branch line is computed by multiplying the estimated third-year sales to the customer by 10 cents and dividing the result by 15%. See *Michigan Wisconsin Pipe Line Co.*, 21 F.P.C. 552, 558, fn. 5 (1959); see, also, *Michigan Wisconsin Pipe Line Co.*, 24 F.P.C. 177 (1960), where despite the numerous questions raised as to scope and impact of this formula, the Commission refused to modify it and applied it without any change.

and operating these branch lines become a system cost, shared by all customers including Michigan Gas as an existing customer of Mich Wis in the Lower Peninsula area of Michigan.

To eliminate the unlawful discrimination thus inherent in Mich Wis' proposal, Michigan Gas suggested,[11] first, that if the Upper Peninsula markets were to pay the same rate as all other customers, Mich Wis' branch line extension practice should also be made applicable to the Upper Peninsula. Alternatively, Michigan Gas suggested that if the Upper Peninsula markets were to receive delivery at the Mich Wis pipeline (at Menominee) and thus bear the entire burden of the construction and operation of the necessary branch lines, a rate differential reflecting the different conditions of service should appropriately be provided (R. 173-175).[12]

The Commission in its order and accompanying Opinion No. 331, issued October 31, 1959, directed Mich Wis to deliver gas for the Upper Peninsula to Michigan Gas, rather than to Consolidated (R. 364, 376, 387-388, 395). However, it also directed that Michigan Gas should receive the gas at Menominee, thereby requiring the Upper Peninsula to bear the full cost of the branch line from Menomi-

[11] These suggestions were adopted by Michigan Gas from among those enumerated by the Commission for the elimination in a parallel situation in 1950, which, coincidentally also involved both Mich Wis and Michigan Gas. *Michigan Wisconsin Pipe Line Co.*, 9 F.P.C. 127, 134 (1950).

[12] The principal feature of this suggestion was the removal of a limitation upon the number of days that the maximum daily quantities of natural gas could be used. The ability to use the maximum daily quantities each day of the year produced larger annual volumes which would, under the normal operation of the demand-commodity rate form embodied in Mich Wis' rate schedule, lower the average cost per Mcf of gas to the Upper Peninsula, thus providing the rate differential.

nee, and pay for such pipeline delivery the same rate paid by all other customers of Mich Wis receiving delivery at the end of a branch line constructed by Mich Wis (R. 376). In so directing, the Commission did not deny that this direction resulted in unlawful discrimination against the Upper Peninsula, independently of Michigan Gas' suggestions. Despite this, however, the Commission assumed that a ruling on Michigan Gas' alternative suggestions was all that was required for disposition of the problem. Accordingly, holding that adoption of either of Michigan Gas' suggestions would unduly favor the Upper Peninsula, the Commission made no inquiry into other possible means for eliminating the unlawful discrimination, nor undertook to eliminate the discrimination by some appropriate means (R. 370-379).

On December 29, 1960, the Commission denied Michigan Gas' application for rehearing (R. 428-447). Commissioner Connole, dissenting, pointed out the necessity for the elimination of the discrimination (R. 446-447). On review, the Court of Appeals affirmed (App. A, *infra*, pp. 1a-5a).

REASONS FOR GRANTING THE WRIT

1. This case presents the question whether the Commission has a duty under the Natural Gas Act to eliminate undue discrimination only if appropriate means therefor are suggested by one of the parties or whether, if such suggestions are found to be inadequate, the Commission has the additional and further responsibility itself to devise proper means to eliminate the discrimination.

In assuming that the Natural Gas Act imposes only the limited duty upon the Commission, both the Commission and the court below committed blatant error. Section 4(b), *supra*, p. 2, the section dealing with unlawful discrimination, plainly does not support any such limited reading of the Commission's responsibility. On the contrary, that section by prohibiting unlawful discrimination in broad and sweeping terms, clearly imposes an affirmative respon-

sibility upon the Commission to eliminate such discrimination and leaves no room for evasion of this duty on the plea that appropriate means for the elimination have not been suggested. See, also, Section 5(a) of the Natural Gas Act, 15 U.S.C. 717d(a).

This Court has already recognized the breadth and importance of Section 4(b). Not only has the Court consistently noted that Section 4 is "the heart of the Act" (*Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 611, 612 (1944); *Atlantic Refining Co.* v. *Public Service Commission of the State of New York*, 360 U.S. 378, 388 (1959)), but it has reiterated repeatedly that the primary purpose of the Act is to protect consumers against exploitation at the hands of natural gas companies. *Federal Power Commission* v. *Hope Natural Gas Co.*, *supra* at p. 610; *Phillips Petroleum Co.* v. *State of Wisconsin*, 347 U.S. 672, 685 (1954); *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, 147 (1960); *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 19 (1961).

An inherent facet of such purpose necessarily is protection against unlawful discrimination, inasmuch as its consequences frequently are more virulent and invidious than excessive prices alone. The evil of discrimination has been recognized from earliest days as one of the prime factors necessitating utility regulation and the inhibitions against unlawful discrimination—such as those in Section 4(b) have been included in virtually all regulatory statutes. The Commission itself has long recognized but disregarded in the present case—that the leverage inherent in the power to discriminate, if uncontrolled, is such as to enable the utility to control and impede—indeed, even entirely to frustrate—the economic growth and development of those affected thereby. *Otter Tail Power Company*, 2 F.P.C. 134, 142-143 (1940).

The Commission's dereliction of its duty in this case, therefore, patently presents a question of importance gen-

erally and in the administration of the Gas Act. If the Commission's duty as to unlawful discrimination were limited, as assumed by the Commission and the court below, the consumers would be subject to the very exploitation which the Act was designed to prevent. The result would be a substantial gap in "the comprehensive and effective regulatory scheme" intended by Congress. *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp., supra*, at p. 19; *Panhandle Eastern Pipe Line Company* v. *Public Service Commission*, 332 U.S. 507, 520 (1946).

2. The Commission's failure to fulfill its responsibility under the Act here produces the very consequences of uncontrolled discrimination that the Act is designed to prevent. To produce the hoped-for benefits for the Upper Peninsula, the natural gas must be available at a price that induces potential buyers to become actual customers that enables existing industries in the area to use natural gas and induces new industries to locate in the area. Such a price is one which is competitive with other fuels, i.e., a price that provides savings in fuel costs.

Natural gas which cannot be competitively priced is no inducement to existing or new industries and under such conditions the economic problems of the region remain. *But for the discrimination imposed by the Commission on the Upper Peninsula, natural gas could be priced competitively.* The unlawful discrimination in this case, which consists of placing the full burden of the cost of the branch line from Menominee entirely upon the Upper Peninsula *and* requiring it to pay the same rate paid by all other customers who are relieved of the burden of the cost of the branch lines in whole or in part, results in a price for gas so high as to make the gas virtually unsalable and to destroy the economic basis of the project.

As noted *supra*, p. 4, the mining industry in the Upper Peninsula, on which the area's economy is presently largely dependent, is struggling for existence because of the severe

competition of high-grade iron ore imported from abroad and of ores developed in other regions in the Lake Superior district, particularly on the Mesaba range where competitively-priced natural gas is available to the iron ore industry. The ability of the Upper Peninsula's iron ore mining industry to meet this competition through the pelletizing or conversion process depends on the grade and desirability of the product produced and the price at which it can be sold in the open market (R. 21). The cost of the fuel used to develop the heat in the conversion process is a critical element determining whether the iron ore industry can meet this competition—can indeed survive (R. 25, 125).[12] The importance, therefore, of the availability of natural gas—the ideal fuel for the purpose—priced to permit the manufacture of a product that can compete quality wise and price-wise—is thus crucial (R. 25). The discrimination imposed upon the Upper Peninsula prevents this.

The availability of natural gas, priced competitively to produce savings in fuel costs, would also attract industry to the area which, as already noted, has a bountiful supply of natural resources, including timber and copper. In almost all industrial companies a very substantial and significant part of their cost of operations—and consequently of their products—is the cost of fuel used for space heating and in the manufacturing process. It has been the general experience of other areas following the introduction of competitively-priced natural gas that industries have lo-

[12] The economic well-being and survival of the Upper Peninsula's iron ore mining industry is essential to the national defense (R. 25). In the event of war, the foreign supplies of ore might well be cut off, in which case, the defense industries of this country, "would be absolutely dependent upon domestic production" (R. 25).

cated there.[14] The Upper Peninsula has been shunned because it could not offer natural gas at all (R. 126-127); the situation will not be improved unless the natural gas it can offer is competitively priced.

3. That the Commission's order here results in unlawful discrimination is clear under the Commission's own precedents. In *Michigan Wisconsin Pipe Line Co.*, 9 F.P.C. 127 (1950), where Mich Wis had proposed that three companies (including Michigan Gas) should "take delivery at Michigan-Wisconsin's pipeline system * * * [and] pay the same rate other customers will pay who receive delivery at the city gates of the communities served by them or at another requested point of delivery" (9 F.P.C. at 135), the Commission unequivocally held that this proposal would

> result in undue discrimination against these three distributing customers and will give an undue preference and advantage to other customers of Michigan Wisconsin (*Ibid.*).[15]

The conditions of service there condemned by the Commission are identical to those here directed by the Commission for the service to the Upper Peninsula. Tracking Mich Wis' proposal in the earlier case, the Commission has here provided that the Upper Peninsula should receive only delivery at Mich Wis' pipeline (at Menominee) and

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[14] In investigating areas for possible location of plants, industrial corporations are vitally interested in the types of fuels that are available in a given area and their cost. As would be expected, industrial corporations are attracted to areas that have good fuel supplies at prices that would provide significant savings. With its many desirable features that other fuels do not possess, industry has been attracted to areas that have natural gas priced to produce such savings.

[15] See, also, *Northern Natural Gas Company*, 11 F.P.C. 174 (1952); *San Juan Pipe Line Co.*, 9 F.P.C. 170, 185 (1950); *Otter Tail Power Co.*, 2 F.P.C. 134, 140-145 (1940); *Panhandle Eastern Pipe Line Co.*, 10 F.P.C. 328, 339 (1951).

pay the same rate that all other customers of Mich Wis pay for delivery at the end of a branch line constructed by Mich Wis all the way to the city gate or that distance required by the application of the so-called "10-cent" formula. Thus, only the Upper Peninsula, under the Commission's order here involved, must bear solely and directly the full $8,000,000 cost of the branch line from Menominee.[16] In sharp contrast the areas served by all other customers of Mich Wis bear only the cost, if any, of that part of the branch line constructed by Mich Wis. The cost of the branch lines constructed by Mich Wis becomes a system cost shared by all of Mich Wis' customers, including Michigan Gas in its Lower Peninsula operations.

Mich Wis' branch-line extension practice here denied only to the Upper Peninsula and under which all customers of Mich Wis share with other new market areas the cost of the line to those areas was adopted and has been followed to make natural gas service possible for all areas on the Mich Wis system.[17] It constitutes an integral part of the terms of service to which a customer paying Mich Wis' rate is entitled, for the rate is admittedly designed to recover Mich Wis' investment in such branch lines (R. 52-53; see, also, R. 433).

The unlawful discrimination visited against the Upper Peninsula is highlighted by the other actions taken by the Commission in the very order here under review. In this order, the Commission authorized Mich Wis to construct

[16] Of the $8,000,000 total cost, Mich Wis would be required, under its branch-line extension practice, to construct a part of the line at a system cost of about $4,500,000. The Upper Peninsula would bear the balance directly and solely.

[17] Michigan Gas has never objected to sharing these costs by way of the rates paid by it in the Lower Peninsula area, and this has helped other areas in Michigan, and particularly Wisconsin, secure natural gas on an economic basis which would not otherwise have been possible.

a branch line, 71 miles long, to provide city-gate service to three communities in the Wisconsin River Valley (Wausau, Antigo and Merrill). In addition, the Commission directed Mich Wis to furnish gas to several other new communities, and, as to them, unlike the Upper Peninsula, required Mich Wis to construct branch lines under its so-called "10-cent" formula.[18] Since Michigan Gas, as a customer of Mich Wis in the Lower Peninsula, must share in the cost of the lines constructed by Mich Wis for these communities, the discrimination against the Upper Peninsula becomes all the more egregious.

4. Although the Commission's direction that Mich Wis deliver gas for the Upper Peninsula only at the pipeline (Menominee) at a rate providing for delivery at the terminus of a branch line constructed by Mich Wis patently resulted in unlawful discrimination against the Upper Peninsula under the Commission's own precedents, the court below assumed, as the Commission had done earlier, that rejection of Michigan Gas' alternative suggestions for the elimination of this discrimination was dispositive.[19]

Michigan Gas advanced its suggestions in the sincere belief that the adoption of either of them would result in

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[18] The Commission's suggestion, that Mich Wis' investment in main line facilities to Menominee, allegedly solely for the Upper Peninsula, discharged whatever obligation Mich Wis might have in this regard (App. A, *infra*, p. 3a; R. 376), aggravates the discrimination against the Upper Peninsula. In no other instance has the Commission taken into account main line investment in directing Mich Wis to extend its branch-line practice to the area involved. In any case, even if such investment could properly be so taken into account, it falls far short of constituting the full measure of Mich Wis' participation under the 10-cent formula.

[19] The Commission's confusion of the unlawful discrimination with Michigan Gas' suggestions for its elimination is exemplified by the Commission's failure to treat the two matters separately. See R. 376-377.

equal, not favored treatment for the Upper Peninsula.[20] However, the Commission's rejection of these suggestions in no way operated to minimize or dissipate the unlawful discrimination. The unlawful discrimination exists separate and distinct from Michigan Gas' suggestions and while the discrimination was the *raison d'etre* for these suggestions, their rejection still left the discrimination fully operative against the Upper Peninsula. Thus, even if acceptance of Michigan Gas' suggestions would have unduly tipped the balance in favor of the Upper Peninsula, as the Commission held, there still remained upon the Commission the duty imposed by Section 4(b) of the Act to eliminate the unlawful discrimination. See *supra*, pp. 10-12.

With the rejection of Michigan Gas' suggestions, therefore, the Commission was still obligated under the Act to take appropriate steps to eliminate the prohibited discrimination on the basis of the record already made, or, if it deemed the record inadequate for that purpose, to reset the case for hearings on that issue. As Commissioner Connole stated in his dissent on rehearing (R. 446-447):

> I dissent from so much of the order that denies reconsideration of our earlier position on service to the upper peninsula of the State of Michigan. I believe the application for rehearing filed by Michigan Gas and Electric Company sets forth sound grounds on which to conclude that our action taken in Opinion No. 331 makes for unlawful discrimination and should be eliminated. At least, it seems to me, a reopening of this proceeding should be permitted. I believe the ACQ-1 rate requires the availability of service to Michigan Gas and Electric without the obligation on its part to build the connecting line, or if it does build the line, that it be required to do so under the terms

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[20] In an effort to meet the Commission's objectives that one of the two suggestions unduly tipped the balance in favor of the Upper Peninsula, Michigan Gas suggested a third way for eliminating the discrimination (R. 413). The Commission, however, pre-emptorily brushed this suggesti. n aside (R. 438).

> of a formula, either consistent with the so-called "10¢ formula" or consistent with the terms of a formula developed on a record after rehearing on that issue alone.

Subsequently, in another case involving an application by Mich Wis to construct and operate a 48-mile branch line from Madison, Wisconsin, to Baraboo, Wisconsin, in order to provide city-gate service to another sister company, Milwaukee Gas Light Company, the Commission adopted the very position advanced by Commissioner Conole that inapplicability of the "10-cent" formula did not end the matter. In that case, Mich Wis in justifying its proposal to construct the entire branch line, contended that the "10-cent" formula (under which only a minor part of the line would be constructed by Mich Wis) was inapplicable to a branch line of such length. The Commission accepted this contention but rejected Mich Wis' application. In so doing, it held that "an acceptable formula" for "longer laterals" must be shown. The absence of such a formula, the Commission pointed out, left "open the door to unlimited discrimination" and clear unfairness to "existing and potential customers" of Mich Wis. *Michigan Wisconsin Pipe Line Co.*, Docket No. G-20572, Opinion No. 345, issued June 28, 1961, mimeo ed., pp. 9-10. Such is precisely the result of the Commission's dereliction of duty here.

The court below plainly erred, therefore, in failing to remand the case to the Commission for further proceedings, including further hearings if the Commission deemed the present record inadequate, directed at devising a proper means of eliminating the unlawful discrimination inherent in requiring Michigan Gas to pay for gas left for the Upper Peninsula at Menominee, many miles from the Upper Peninsula's market area, at the same rate paid by all other customers of Mich Wis for gas delivered at the termini of branch lines constructed by Mich Wis in accordance with its branch line practice.

CONCLUSION

The failure of the Commission to discharge its full responsibilities to eliminate undue discrimination, which seriously impedes the economic growth of a large part of the State of Michigan, presents a question of importance both generally and in the administration of the Natural Gas Act. For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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August, 1961

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,592

MICHIGAN GAS AND ELECTRIC COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT
MICHIGAN WISCONSIN PIPE LINE COMPANY, INTERVENOR

Petition to Review Orders of the
Federal Power Commission

Decided April 20, 1961

Mr. Reuben Goldberg, with whom *Mr. Melvin Richter* was on the brief, for petitioner.

Mr. David J. Bardin, Attorney, Federal Power Commission, with whom *Messrs. John C. Mason*, General Counsel, Federal Power Commission, *Howard E. Wahrenbrock*, Solicitor, Federal Power Commission, and *Robert L. Russell*, Assistant General Counsel, Federal Power Commission, were on the brief, for respondent.

Mr. Charles F. Shannon, with whom *Mr. Louis Flax* was on the brief, for intervenor.

Before WILBUR K. MILLER, Chief Judge, and EDGERTON and DANAHER, Circuit Judges.

WILBUR K. MILLER, *Chief Judge*: The Michigan Gas and Electric Company distributes manufactured gas at retail in several communities in the Upper Peninsula of Michigan. For the purpose of obtaining natural gas for its distribution systems, it intervened in the proceedings before the Federal Power Commission in which Midwestern Gas Transmission Company was seeking authority to import natural gas from Canada and in which Midwest-

ern and Michigan Wiconsin Pipe Line Company were seeking authority to construct and operate various facilities for further transmission of the gas so imported.

Michigan Gas proposed to the Commission alternative methods by which its properties could receive the desired supply of natural gas, both of which involved pipe line construction into the Upper Peninsula from Menominee, the most northern point of the system of Michigan Wisconsin.

First, it suggested that Michigan Wisconsin be required to construct and operate a pipe line from Menominee to its various city gates, and to sell and deliver gas to it at those points at the ACQ-1 rate schedule, which is applicable to all other customers of Michigan Wisconsin.[1]

---

[1] Michigan Gas urged that this substantial extension of facilities by Michigan Wisconsin would be consistent with the latter's so-called 10-cent formula, which was being used by Michigan Wisconsin as a convenient yardstick in determining the economic feasibility of constructing comparatively short laterals to serve small communities located near its existing main pipe lines.

This formula "provides that the operating costs of the lateral, or the portion of the lateral, to be installed by Michigan Wisconsin shall not exceed 10-cents per Mcf on the basis of the estimated annual firm sales to the distribution project in the third year. In the formula, the operating costs are set out at 15% of the estimated cost of construction of the lateral, or portion of the lateral and appurtenant facilities, as follows:

Return	6.0%
Income Taxes	3.0%
General Taxes	1.5%
Depreciation	3.5%
Operation and Maintenance	1.0%
	15.0%

Michigan Wisconsin Pipe Line Co., et al., 21 F.P.C. 552, 558, n. 5 (1959).

Second, Michigan Gas suggested as an alternative that it construct a pipe line from Menominee to its city gates, and take delivery at Menominee, but at the DCQ rate, which is lower than the average rate paid by other customers of Michigan Wisconsin under its system-wide ACQ rate schedule.

In rejecting the first of these proposals, the Commission noted that under it Michigan Wisconsin would be required to invest four and one-half million dollars in a new pipe line from Menominee northwardly to the scattered properties of Michigan Gas. It found that, instead of having been used in the consideration of such substantial extensions, the so called 10 cent formula is in general applicable to relatively short laterals; and that the maximum distance Michigan Wisconsin has built under it in the past is a line some seventeen and one-half miles long at a cost of approximately $300,000. The Commission further noted that, under the first proposal of Michigan Gas, Michigan Wisconsin would be obligated to invest the additional sum of nearly two and one-half million dollars in adding capacity to the line from Waupaca, Wisconsin, to Menominee, which is now merely a lateral, solely to provide service to the Upper Peninsula. The Commission therefore found that adoption of this proposal would impose an excessive burden on the existing customers of Michigan Wisconsin.

As to the second of petitioner's alternative proposals, the Commission found that if Michigan Gas were permitted to purchase gas at Menominee under the DCQ rate, the result would be discrimination against the existing customers of Michigan Wisconsin, and summarized its reasoning by adopting this language from its staff's brief:

> Finally, there are certain areas of this country which are situated in unfortunate geographical locations in relation to the availability of natural gas. It is no fault of these areas that they happen to be victims of geography. On the other hand, the existing customers can hardly be required to pay excessive

> costs just to make certain that the areas which are located a great distance from the source of supply may have the benefits of natural-gas service. The hard realities of such circumstances are that those areas must be willing to pay the costs associated with obtaining natural-gas service or be satisfied with other fuels which may be less desirable but which may be more economical than natural gas."

Having rejected these proposals, the Commission directed Michigan Wisconsin to deliver natural gas to Michigan Gas at Menominee in volumes sufficient to serve the Upper Peninsula distribution systems, and to charge therefor the uniform rate applicable to all customers of Michigan Wisconsin.[2] Thus, although Michigan Wisconsin was not required to construct the expensive facilities necessary to connect Menominee with the city gates in the Upper Peninsula, it was required to bear the cost of enlarging the capacity of the lateral from Waupaca to Menominee.

Dissatisfied with the Commission's action, Michigan Gas petitions for review of so much of the order as relates to it. It charges that unlawful discrimination against consumers in the Upper Peninsula will result, in violation of Section 4(b) of the Natural Gas Act. It asks this court to set aside the portion of the order of which it complains, and to remand the case to the Commission with directions to enter an order directing Michigan Wisconsin to deliver gas to the petitioner under either of the two alternative proposals which petitioner advanced before the Commission and which were rejected as contrary to the public interest.

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[2] The Commission's order accompanying its opinion of October 31, 1959, also authorized the Midwestern Gas Transmission Company to import gas from Canada, authorized Midwestern and Michigan Wisconsin to construct and operate various facilities not material to the matter under consideration, and ordered service to Michigan Gas on the basis indicated.

It is obvious that either of the proposals of Michigan Gas would unduly discriminate in its favor, and would impose an undue burden upon the other customers of Michigan Wisconsin. The findings of the Commission are adequately supported by the record, and we cannot say they are clearly erroneous. This court stated in *Battle Creek Gas Co. v. Federal Power Comm'n*, 108 U. S. App. D. C. 209, 213, 281 F. (2d) 42 (1960):

> "The role of reviewing courts in passing on the rate-making methods used by administrative agencies is necessarily narrow. These matters are properly for the Commission, and its determination is to be disturbed for only the most basic forms of abuse."

The same may be said about the present order which deals with rates and service. Since we find no abuse on the part of the Commission, its order must be upheld.

Affirmed.

APPENDIX B

(Filed April 20, 1961)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,592

September Term, 1960.

MICHIGAN GAS AND ELECTRIC COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*,
MICHIGAN WISCONSIN PIPE LINE COMPANY, *Intervenor*.

On Petition to Review Order of the Federal Power Commission.

Before: Wilbur K. Miller, Chief Judge, and Edgerton and Danaher, Circuit Judges.

Judgment

This case came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the order of the Federal Power Commission on review in this case is affirmed.

Per Chief Judge Wilbur K. Miller.

Dated: April 20, 1961.

APPENDIX C

(Filed June 1, 1961)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1960

No. 15,592

MICHIGAN GAS AND ELECTRIC COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*,
MICHIGAN-WISCONSIN PIPELINE COMPANY, *Intervenor*.

Before: Wilbur K. Miller, Chief Judge, Edgerton, Prettyman, Bazelon, Fahy, Washington, Danaher, Bastian and Burger, Circuit Judges, in Chambers.

Order

Upon consideration of petitioner's petition for a rehearing en banc, it is

ORDERED by the court that the petition for rehearing en banc is denied.

Dated: June 1, 1961

-BRARY

FILED
SEP 28 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1961

No. 368

Michigan Gas and Electric Company, Petitioner

v.

Federal Power Commission,
Michigan-Wisconsin Pipe Line Company,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Brief Amici Curiae of the Cities of Gladstone, Iron Mountain, Ishpeming, Kingsford, Marquette, Negaunee, and Norway, Michigan, in Support of the Petition for a Writ of Certiorari.

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September, 1961

Delta Reporter Print — 3 — Gladstone, Michigan

IN THE

Supreme Court of the United States

October Term, 1961

No. 368

Michigan Gas and Electric Company, Petitioner

v.

Federal Power Commission,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Brief Amici Curiae of the Cities of Gladstone, Iron Mountain, Ishpeming, Kingsford, Marquette, Negaunee, and Norway, Michigan, in Support of the Petition for a Writ of Certiorari.

This amici curiae brief is submitted jointly by the cities of Gladstone, Iron Mountain, Ishpeming, Kingsford, Marquette, Negaunee, and Norway (hereinafter collectively referred to as "Municipalities"). It is filed pursuant to Rule 42 (4) of the rules of this Court and in support of the petition for a writ of certiorari filed in the above case by Michigan Gas and Electric Company on August 30, 1961.

The filing of this brief has been authorized by resolutions adopted by the governing council of each of the Municipalities because the issue presented by Michigan Gas and Electric's petition is a matter of grave and vital concern to the Municipalities, to the Upper Peninsula of Michigan in which they are located, and to the general citizenry of the Upper Peninsula. The economic future of the Upper Peninsula is involved in this case. The outcome of this case will determine whether the Upper Peninsula can obtain reasonably-priced natural gas which will go a long way in enabling it to put an end to, and reverse, the economic deterioration now existing in the area.

The Municipalities adopt as part of this brief the statement of the facts, question presented, and reasons for granting the writ as set forth in Michigan Gas and Electric's petition. The Municipalities believe that the petition filed by Michigan Gas and Electric conclusively demonstrates why this Honorable Court should review the decision of the Court of Appeals. In this brief, the Municipalities want to bring the following specifically to the attention of your Honorable Court.

1. The Upper Peninsula is one of the few large areas of the country that does not have natural gas service. It is an economically depressed area; classified by the United States Department of Labor as an area of substantial and chronic labor surplus. One of the reasons for the area's condition is that it is at present largely dependent upon one industry—the iron-ore mining industry. This industry is now having difficulties in competing with high grade iron ores produced and processed in other parts of the country and imported from abroad. The local iron ore industry has developed processes to convert the local low grade iron ores into a

pellitized high-grade form in an effort to compete with the high grade iron ores from other parts of the country and abroad. An abundant and dependable supply of reasonably-priced natural gas—the ideal fuel for the conversion processes which require large quantities of heat—would help the local industry's competitive position.

The absence of natural gas service has also been an important factor in preventing the Upper Peninsula from attracting new industries and retaining existing industry. Within the past month, the largest producer of charcoal briquets in the country abandoned its Upper Peninsula operations in Kingsford, one of the Municipalities, because of the company's inability to manufacture a product in the Upper Peninsula which could compete on the open market. The loss of this industry represents an annual loss to the economy of the Upper Peninsula of $5,000,000 and a direct loss of jobs to over 350 people in Kingsford alone.

Moreover, the long, cold winters of the Upper Peninsula impart to natural gas service a special importance for residential and commercial spaceheating.

2. Although the Commission's decision in this case authorized natural gas service to the Upper Peninsula, the gas cannot be reasonably priced to aid the industrial development of the area and to provide a sounder and healthier economy. Under these circumstances, the Commission's allotment of natural gas to the Upper Peninsula is worthless. This is so only because the Commission's order imposes the full cost ($8,000,000) of the pipeline connection from Menominee, Michigan, to the Municipalities, upon the Upper Peninsula.

On no other area supplied by Michigan Wisconsin Pipe Line Company has the full cost of the pipeline connection been imposed. For all other areas served by it, Michigan Wisconsin has built the pipeline connection needed, in whole or in part.

The Commission's refusal to give the Upper Peninsula the same treatment plainly discriminates against it. The service to be provided the Upper Peninsula is clearly inferior to the service received by the other areas. Yet, under the Commission's order, the Upper Peninsula is to pay Michigan Wisconsin the same rate paid by the other areas which have far superior service!

As the petition filed by Michigan Gas and Electric demonstrates, the Commission recognized that this discriminated against the Upper Peninsula and that Michigan Gas and Electric has suggested various alternatives for its elimination. The Commission, however, rejected these suggestions and left the discrimination outstanding because it thought the Upper Peninsula was seeking favored treatment.

But the Upper Peninsula was not and is not now seeking favored treatment. Nor does the Upper Peninsula seek a subsidy. It asks only the same treatment from Michigan Wisconsin that the other areas receive for the same rate. Freed of the discriminatory burden, the gas can be sold in the Upper Peninsula at rates that will attract industry, retain existing industry, and strengthen the iron-ore mining industry's competitive position on the market.

Erroneous also was the Commission's failure to devise a non-discriminatory basis for service to the Upper Peninsula. Unlike a court, the Commission is not

limited by the alternative proposals presented by the parties. Instead, once it has uncovered the discrimination, it has an affirmative duty, owed directly to the public under the Natural Gas Act, to eliminate the discrimination irrespective of the posture of the parties.

The Commission's erroneous conception of its duty, together with the error's drastic consequences for the Upper Peninsula, makes it of urgent importance to the Upper Peninsula that this Honorable Court take favorable action on the petition for a writ of certiorari filed by Michigan Gas and Electric Company.

Respectfully submitted,

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September, 1961

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 29 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 368

MICHIGAN GAS AND ELECTRIC COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION,
MICHIGAN WISCONSIN PIPE LINE COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF MICHIGAN WISCONSIN PIPE LINE COMPANY IN OPPOSITION

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September 29, 1961

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF MICHIGAN WISCONSIN PIPE LINE COMPANY IN OPPOSITION

OPINIONS BELOW

The opinion and orders of the Federal Power Commission (R. 339-397, 428-447) are reported at 22 F.P.C. 775 and 22 F.P.C. 1157. The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 1a-5a) is reported at 290 F. 2d 374.

JURISDICTION

The judgment of the Court of Appeals was entered on April 20, 1961 (Pet. App. 1b). A petition for rehearing en banc was denied on June 1, 1961 (Pet. App. 1c). The petition for a writ of certiorari was filed on August 30, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the Court below erred in affirming the Federal Power Commission's finding that a distribution company's demand that a natural gas pipeline be required to construct certain additional facilities for service to new markets or provide an equivalent differential in rates would discriminate against the pipeline's other customers.

STATUTES INVOLVED

The Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U.S.C. 717 *et seq.*, provides in pertinent part as follows:

> "Section 4(b). No natural-gas company shall with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service."
>
> * * * * * * * * *
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> "Section 7(a). Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public inter-

est, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers."

STATEMENT

Michigan Wisconsin Pipe Line Company is an interstate pipeline company which transports natural gas from Texas and Oklahoma to points in Michigan and Wisconsin, where it sells the gas to distributing companies for resale to consumers in the area. In February of 1959, Michigan Wisconsin entered into an agreement with Midwestern Gas Transmission Company to purchase 158,000 Mcf per day of natural gas to be imported by Midwestern from Canada and transported through a proposed new pipeline from the Canadian border to central Wisconsin. In order to receive the Canadian gas into its system, Michigan Wisconsin proposed to construct a large diameter extension of its existing pipeline facilities in Wisconsin to connect with Midwestern's new line near Marshfield, Wisconsin (R. 301-312).

The new Canadian supply was needed by Michigan Wisconsin principally to augment deliveries to its existing customers. However, in accordance with long-standing commitments and to carry out the suggestions contained in an earlier decision of the Federal Power Commission regarding service to new markets in the area,[1] Michigan Wisconsin formulated a project that would also provide natural gas to a number of new communities in central Wisconsin in the vicinity of its proposed new trunk line to Marshfield. Michigan Wisconsin's project also contemplated construction of a pipeline northeast from Waupaca, Wisconsin, to Menominee, Michigan, the gateway to the Upper Peninsula of Michigan, and service to the communities adjacent to that line (R. 204).

Michigan Wisconsin's proposed service to Menominee and the communities in Wisconsin presented no question as to economic feasibility. However, service to the widely-scattered and distant communities in the Upper Peninsula, including the construction of the necessary pipeline facilities extending north from Menominee, presented serious economic problems. These problems were accentuated by the fact that two-thirds of the total firm load in the Upper Peninsula is represented by one customer, Cleveland Cliffs Iron Company, which would use gas in the beneficiation and pelletizing of iron ore (R. 10-11).

Petitioner, Michigan Gas and Electric Company, distributes manufactured gas in three communities and has franchises to distribute gas in four other communi-

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[1] *American Louisiana Pipe Line Company, et al.*, 20 F.P.C. 575 (1958).

ties in the Upper Peninsula. Upon concluding its agreement with Midwestern for an additional gas supply, Michigan Wisconsin accordingly approached Petitioner with an offer to provide natural gas to Petitioner for service to the Upper Peninsula communities. Michigan Wisconsin proposed to provide city gate service in the Upper Peninsula at a rate which would reflect its uniform system-wide rate at Menominee, Michigan, plus the additional cost of service associated with the facilities required to transport the gas from Menominee to the various delivery points in the Upper Peninsula. Alternatively, Michigan Wisconsin offered to sell gas to Petitioner at Menominee at Michigan Wisconsin's system-wide rate if Petitioner desired to construct and operate the Upper Peninsula transmission system (R. 56-57).

Petitioner rejected both proposals and demanded city gate deliveries by Michigan Wisconsin at each community in the Upper Peninsula at a rate substantially lower than that necessary to recover the cost of transporting the gas from Menominee. This would have thrown the costs of the pipeline facilities in the Upper Peninsula upon Michigan Wisconsin's other customers. Since Michigan Wisconsin felt that this would be unfair and discriminatory to its other customers, it refused to agree to Petitioner's demands (R. 57-58).

However, because of the strong public interest in extending natural gas to the Upper Peninsula, Michigan Wisconsin asked Michigan Consolidated Gas Company, the largest gas distributing company in Michigan, whether that company "could conceive a means of putting together an economic project to get gas to

the Upper Peninsula" (R. 110-111).[2] Michigan Consolidated then formulated a proposal under which it would purchase gas at Menominee from Michigan Wisconsin at the latter's uniform system-wide rate and build the necessary facilities to transport and sell the gas to Petitioner and to the municipal gas system of Escanaba, Michigan, at their "city gates" and to Cleveland Cliffs.

The rates proposed by Michigan Consolidated for firm service to Petitioner, Escanaba and Cleveland Cliffs were calculated to provide less than a 6 percent rate of return to Michigan Consolidated on its facilities in the third year. Michigan Consolidated was willing to accept this relatively low rate of return and the risks inherent in service to the Upper Peninsula in order to make the benefits of natural gas service available to the Upper Peninsula. Its proposal was designed to make it possible for Cleveland Cliffs to purchase gas on a basis competitive with other fuels and for Petitioner and Escanaba to resell the gas to their consumers on an economic basis (R. 10-14).

While the City of Escanaba signed a contract with Michigan Consolidated, and Cleveland Cliffs indicated

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[2] Michigan Consolidated, which distributes natural gas in Detroit and other communities throughout the Lower Peninsula of Michigan, is the largest customer of Michigan Wisconsin. Both companies are wholly-owned subsidiaries of American Natural Gas Company, a registered holding company under the Public Utility Holding Company Act of 1935.

It was essential that Michigan Wisconsin immediately file an application to construct the facilities necessary to accept and transport the Midwestern gas in view of the provision in Midwestern's contract with Trans-Canada permitting cancellation if a certificate were not issued by November 1, 1959 (R. 336). The certificates were issued on October 31, 1959 (R. 339).

its satisfaction with the proposal, Petitioner refused even to consider purchasing gas from Michigan Consolidated (R. 16-17).

In order to present to the Commission a concrete proposal for service to the Upper Peninsula, Michigan Wisconsin provided in its certificate application, filed April 15, 1959, for a line to Menominee, with sufficient capacity to supply the volumes of gas needed by the Upper Peninsula and requested authority to deliver up to 37,200 Mcf per day to Michigan Consolidated for service to Petitioner, Escanaba and Cleveland Cliffs in the Upper Peninsula (R. 301-312). At the hearings on its application Michigan Wisconsin showed that its proposed line to Menominee would be considerably smaller in size if service to the Upper Peninsula were not to be provided and that the additional cost to Michigan Wisconsin of constructing the larger capacity line to Menominee for that service is $2,377,194 (R. 376). Michigan Wisconsin's policy witness repeated on several occasions its willingness to sell gas to Petitioner at Menominee on the same basis as the proposed sale to Michigan Consolidated if Petitioner was willing to construct the necessary pipeline facilities in the Upper Peninsula (R. 57, 64).

Michigan Consolidated in turn presented extensive evidence as to the economic feasibility of its proposal, although it recognized that the proposal would not be feasible if Petitioner continued to refuse to purchase gas from Michigan Consolidated. Evidence was also presented showing that Petitioner could earn a return of between 6 percent and 7 percent under Michigan Consolidated's proposal (R. 298).

Petitioner, which had intervened in the proceedings, flatly announced that it would not purchase gas from Michigan Consolidated and that the latter therefore did not have a project (R. 16). Petitioner then demanded that Michigan Wisconsin be ordered by the Commission to deliver gas to Petitioner on one of two bases: (1) that if deliveries were to be made at Michigan Wisconsin's system-wide rate (known as the "AC'Q rate"), Michigan Wisconsin should be ordered to construct the major portion of the pipeline from Menominee north into the Upper Peninsula at a cost of $4,455,950 in addition to the $2,377,194 Michigan Wisconsin would invest in providing capacity in the line to Menominee for Upper Peninsula service; or (2) that, if deliveries were to be made to Petitioner at Menominee, Michigan Wisconsin be ordered to adopt a new DC'Q Rate Schedule applicable solely to Petitioner under which Petitioner would be able to purchase substantially larger volumes of gas on an annual basis and at a substantially lower average rate than that available to other customers of Michigan Wisconsin (R. 373-379).

Petitioner's first proposal was based on its claim that, in order to avoid discrimination against Petitioner, Michigan Wisconsin should be ordered to construct the additional pipeline facilities north from Menominee in compliance with the so-called "10¢ formula," which Michigan Wisconsin and the Commission had used from time to time in testing the economic feasibility of constructing comparatively short laterals to serve small communities located near its main pipeline. Petitioner's second proposal was nothing more than another demand for a subsidy from Michigan Wisconsin's other customers because of the cost to Petitioner of transporting the gas from Menominee to the markets in the Upper Peninsula.

After receiving briefs and hearing oral argument, the intermediate decision procedure having been waived, the Commission issued its Opinion No. 331 and order of October 31, 1959 in which it authorized Midwestern and Michigan Wisconsin to construct and operate the facilities proposed in their respective applications (R. 339-397).

With respect to the Upper Peninsula, the Commission found that Michigan Consolidated's proposal was economically feasible but that in view of Petitioner's refusal to buy gas from Michigan Consolidated, the proposal could not be approved. The Commission accordingly denied the portion of Michigan Wisconsin's application under Section 7(c) of the Act which requests authority to sell gas to Michigan Consolidated at Menominee for service to the Upper Peninsula. Pursuant to Section 7(a) of the Act, the Commission ordered Michigan Wisconsin to deliver up to 37,200 Mcf per day to Petitioner (rather than to Michigan Consolidated) for service to the Upper Peninsula and, accepting the recommendation of its Staff, the Commission directed that such deliveries be made at Menominee at the same rate and under the same terms and conditions of service as apply to all other customers of Michigan Wisconsin (R. 374-376).

In rejecting Petitioner's request that Michigan Wisconsin be ordered to construct the major portion of the pipeline facilities in the Upper Peninsula at an additional cost of $4,455,950 the Commission found that the 10-cent formula is not applicable to requests for service to new markets located in an entirely new area and requiring the construction of extensive transmission fa-

cilities by Michigan Wisconsin (R. 373-376).[3] Apart from the question whether it wound have statutory authority to require Michigan Wisconsin to construct such facilities,[4] the Commission found that to do so would place an undue burden upon Michigan Wisconsin and its other customers. In rejecting Petitioner's alternative proposal under which Michigan Wisconsin would be required to adopt a new DCQ Rate Schedule to cover its sales to Petitioner at Menominee ,the Commission found that such a proposal would be discriminatory against Michigan Wisconsin's other customers who would be entited to the same differential in rates and was otherwise inappropriate (R. 374-376).

The Commission further found that Petitioner could purchase gas at Michigan Wisconsin's uniform system-wide rate at Menominee as provided in the order here under review and provide service to the Upper Peninsula on an economically feasible basis provided Petitioner obtained a satisfactory long-term contract with Cleveland Cliffs (R. 378-379).

Petitioner filed an application for rehearing in which it advanced a third alternative under which Michigan Wisconsin would be required to share the costs of the transmission facilities for the Upper Peninsula serv-

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[3] Under this formula the extent of the investment to be made by Michigan Wisconsin in such short laterals is computed by multiplying the estimated annual firm sales in the new community in the third year by 10¢ per Mcf and dividing the result by 15% to cover a return of 6%; income taxes of 3%; general taxes of 1.5%; depreciation of 3.5% and operation and maintenance of 1% on the lateral. *Michigan Wisconsin Pipe Line Company, et al.*, 21 F.P.C. 552, 558, fn. 5 (1959).

[4] Cf. *Interstate Commerce Commission* v. *Oregon-Washington R. and Nav. Co.*, 288 U.S. 14 (1933); *Central West Utility Co.* v. *Federal Power Commission*, (3rd Cir. 1957) 247 F. 2d 306.

ice under the ACQ-1 Rate Schedule to the extent necessary to assure Petitioner a 6.5 per cent rate of return in the third year of gas operations in the Upper Peninsula or provide an off-setting rate differential. Petitioner's application for rehearing was denied by the Commission's order of December 29, 1959 with a detailed discussion of the considerations involved (R. 428-446).

Upon Petitioner's petition for review under Section 19(b) of the Natural Gas Act, the Court of Appeals for the District of Columbia Circuit affirmed the order of the Commission (Pet. App. 1a-5a, 1b). The Court concluded after reviewing the record that it was obvious that either of Petitioner's proposals "would unduly discriminate in its favor, and would impose an undue burden upon the other customers of Michigan Wisconsin." The Court further found adequate support in the record for the Commission's findings and concluded that the Commission had properly exercised its judgment (Pet. App. 5a). Petitioner's petition for rehearing en banc was denied by the full Court (Pet. App. 1c).

ARGUMENT

1. Petitioner asks this Court to grant certiorari to consider the question whether the responsibility of the Federal Power Commission under Section 4(b) of the Natural Gas Act prohibiting undue discrimination is properly discharged when, "*in the presence of such discrimination*," the Commission does not itself devise means for its elimination (Pet. 2).[5] This is a purely contrived and hypothetical question which is not presented or involved in this case.

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[5] Italics are supplied throughout this brief unless otherwise indicated.

Petitioner's "question" rests upon the premise that the Commission sanctioned discrimination when it directed Michigan Wisconsin to deliver gas to Petitioner at Menominee under Michigan Wisconsin's uniform system-wide ACQ-1 Rate Schedule. But the Commission specifically concluded that deliveries to Petitioner at that point and under those conditions would *not* discriminate against Petitioner, and conversely that Petitioner's demands for more favorable treatment would result in discrimination against Michigan Wisconsin's other customers. The Commission expressly found, contrary to Petitioner's statements in its petition for certiorari, that:

> "* * * providing for purchases by Michigan Gas under the ACQ-1 Rate Schedule and construction by it of the necessary Upper Peninsula facilities does *not* discriminate against that company" (R. 376).[6]

The Commission further found that the additional concessions demanded by Petitioner, "far from curing any claimed discrimination, would themselves lead to undue discrimination against Michigan Wisconsin's other customers" (R. 436). And, the Court below likewise concluded that:

> "It is obvious that either of the proposals of Michigan Gas would unduly discriminate in its favor, and would impose an undue burden upon the other customers of Michigan Wisconsin" (Pet. App. 5a).

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[6] In its petition for certiorari, Petitioner represented that "the Commission did not deny that this direction resulted in unlawful discrimination against the Upper Peninsula" (Pet. 10). This statement cannot be reconciled with the Commission's express finding quoted above.

Petitioner's "Question Presented" thus assumes that Michigan Wisconsin's proposal to deliver gas for Upper Peninsula service at Menominee was discriminatory and required revision to eliminate the discrimination. The fact is, however, that the Commission found that Michigan Wisconsin's proposal was fair and equitable to Petitioner and, accordingly, was never faced with the problem of devising means to eliminate discrimination (R. 435).

Neither the Commission nor the Court below even remotely held or assumed that the Commission's responsibility to eliminate discrimination is limited to the proposals made by the parties. That question was neither reached nor considered because both the Commission and the Court found that Michigan Wisconsin's proposal to deliver the gas at Menominee was non-discriminatory to begin with. Petitioner's charge that the Commission and Court both "committed blatant error" (Pet. 10) is thus untrue and irresponsible.

While the petition for certiorari for the most part simply assumes that the Commission approved a discriminatory plan of service,[7] Petitioner argues the existence of such alleged discrimination under Point 3 of its petition (Pet. 14-16). Here again, however, Petitioner does not challenge the sufficiency of the evidence to support the Commission's contrary finding but simply asserts that the existence of unlawful discrimi-

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[7] The argumentative device of assuming the major premise of the question presented is indicated by such statements as "the unlawful discrimination thus *inherent* in Mich Wis' proposal" (Pet. 9); "the Commission's direction . . . *patently* resulted in unlawful discrimination" (Pet. 16); "the unlawful discrimination *inherent* in requiring Michigan Gas to pay for gas . . at Menominee" (Pet. 18).

nation is "clear under the Commission's own precedents" (Pet. 14). Petitioner then proceeds with its argument as if it were merely supplying information to explain an obvious conclusion.

The fact is, of course, that the same arguments were made by Petitioner on this precise point before both the Commission and the Court below and, after thorough consideration, were rejected by both. Petitioner now repeats those arguments in its petition for certiorari despite the fact that it has not challenged the sufficiency of the evidence to support the Commission's findings, the adequacy of those findings, or the Commission's competence to decide the question of discrimination. Nor has Petitioner contended that the Court of Appeals erred in affirming the Commission's decision. Petitioner is thus in the anomalous position of asking this Court to *assume*, contrary to the conclusions of both the Commission and Court below, that the Commission's order sanctioned discrimination against Petitioner despite the fact that no review of these conclusions has been sought in this Court.

It is idle for Petitioner to repeat truisms as to the significance of Section 4(b) of the Natural Gas Act and the importance of preventing discrimination (Pet. 11-12). Indeed, the Commission fully recognized and properly discharged its responsibilities in that regard when it rejected Petitioner's demands for further concessions on the ground that they were discriminatory against Michigan Wisconsin's other customers. Few would disagree with the proposition raised by Petitioner in its "Question Presented" that, when confronted with discrimination, the Commission's responsibility to eliminate that discrimination is not limited

or measured by the suggestions of the parties. Here, however, the Commission's order approves a plan of service that it specifically found was non-discriminatory. Certainly the Commission is not required to devise means of eliminating discrimination which it expressly finds does not exist.

2. While Petitioner has not asked this Court to review the question of the sufficiency of the evidence to support the Commission's findings nor alleged any abuse of discretion, Michigan Wisconsin feels it appropriate to comment briefly on the claim—rejected by the Commission and the Court below—that Michigan Wisconsin's proposal to provide gas for Upper Peninsula service at Menominee under its ACQ-1 Rate Schedule discriminated against Petitioner.

First, it should be recognized that such a controversy is not, in practical fact, between the pipeline company and the distribution company seeking to serve a new area but between the distribution company and the other customers of the pipeline. Here, for example, Michigan Wisconsin would necessarily have recovered the cost of constructing and operating the additional facilities demanded by Petitioner by filing increased rates reflecting the additional $4,455,950 investment and related cost of service. Those increased rates would, of course, be paid by existing customers of the pipeline and the consumers they serve.[8]

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[8] Petitioner makes a frankly *ad hominem* argument as to the importance of low cost natural gas to the Upper Peninsula (Pet. 3-5, 12-14). This argument, while relevant, ignores the other side of the equation, namely, the effect upon consumers in other areas served by the pipeline of the increased rates needed to permit below-cost service to the new area. This is the very judgment the Commission is called upon to make and, in fact, made in this case.

The question, therefore, is not one involving either an increase or reduction in the pipeline's profits but how much of a subsidy existing customers of a pipeline should be asked to contribute in order to permit the extension of natural gas service into new and remote areas. Here, Michigan Wisconsin proposed in its certificate application to construct facilities costing $2,377,194 specifically for Upper Peninsula service, representing the increased cost of the pipeline to Menominee required to transport the Upper Peninsula gas to that point. Petitioner demanded a further subsidy of $4,455,950 in the form of additional pipeline facilities north of Menominee, or an equivalent rate differential.

After hearing and considering all of the evidence the Commission, following the recommendation of its Staff, concluded that public convenience and necessity would be served by Michigan Wisconsin's constructing the facilities required to make gas for the Upper Peninsula available at Menominee at the system ACQ rate but that any additional subsidy, as demanded by Petitioner, would discriminate against Michigan Wisconsin's other customers.

It is obvious that questions of undue burden and discrimination involve, to a unique degree, the exercise of judgment and discretion lodged in the Commission by the Natural Gas Act. In a case raising similar issues, the Court below had noted that:

> "These matters are properly for the Commission, and its determination is to be disturbed for only the most basic forms of abuse." *Battle Creek Gas Company* v. *Federal Power Commission*, 281 F. 2d 42, 46 (1960).

Moreover, since the issues posed in the proceeding before the Commission involve public convenience and necessity, this Court's statement in *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 65 (1945) is particularly pertinent:

> "Public convenience and necessity is not defined by the statute. The nouns in the phrase possess connotations which have evolved from the half-century experience of government in the regulation of transportation. * * * The purpose of Congress was to leave to the Commission authoritatively to decide whether additional motor service would serve public convenience and necessity. [Citation] This, of course, gives administrative discretion to the Commission, cf. *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 87, 88, to draw its conclusion from the infinite variety of circumstances which may occur in specific instances. * * *"

The basis of Petitioner's claim of discrimination here, as before the Commission and the Court of Appeals, is the Commission's refusal to apply Michigan Wisconsin's so-called "10-cent formula" to Petitioner's request for service for the Upper Peninsula (Pet. 14-16). This matter was thoroughly considered by the Commission and by the Court below, both of which found that the 10-cent formula has no application to large projects involving the construction of extensive transmission facilities to serve new areas but was simply a rule of thumb applied in testing the economic feasibility of short laterals off the existing pipeline (Pet. App. 3a). Petitioner has not contended that that conclusion is not supported by substantial evidence or was otherwise beyond the Commission's competence to decide.

Petitioner also claims here, as it did before the Commission and the Court below, that Michigan Wisconsin's proposal to provide city gate service to certain communities in the area traversed by its new trunk line in central Wisconsin is inconsistent with its proposal to supply gas to Petitioner at Menominee (Pet. 15-16). In Opinion No. 331 the Commission pointed out, however, that "there are very material differences between that project and the proposal for service to the Upper Peninsula" and explained those differences in detail (R. 376-377). In denying rehearing, the Commission again referred to "the numerous differences between the two proposals fully discussed in Opinion No. 331, including differences of geographic location, relative market stability, comparative growth potentials and other factors" (R. 436-437). Discrimination consists in different treatment under the same or similar circumstances. Where the circumstances are widely different, different treatment is not only justified but required.

In this case the Commission, having weighed all the factors surrounding service to the Upper Peninsula, found that it was necessary and desirable in the public interest to direct Michigan Wisconsin to deliver gas to Petitioner at Menominee at Michigan Wisconsin's system-wide rate; that no discrimination either for or against Petitioner or Michigan Wisconsin's other customers would result therefrom; and that the adoption of Petitioner's proposals would place an undue burden upon Michigan Wisconsin and its other customers. The record amply supports those determinations. Indeed, neither here nor in the Court below has Petitioner contended that the Commission abused its discretion or acted without substantial evidence.

3. In addition to the contention that there is no discrimination against Petitioner under the Commission's order, Michigan Wisconsin pointed out in the Court below that Petitioner cannot properly raise the issue of discrimination under the circumstances here presented. While that Court found it unnecessary to pass on this contention, it provides another reason why the petition for certiorari should be denied.

Petitioner's claim of discrimination is based on the assumption that it had an absolute right to service from Michigan Wisconsin. Starting from the premise that it was entitled as of right to purchase gas from Michigan Wisconsin for Upper Peninsula service, Petitioner then claims discrimination as to the terms and conditions upon which the Commission found that such service should be provided. But Petitioner's contention ignores the fact that Section 7(a) of the Act, under which the Commission ordered the service (R. 395), expressly provides that the Commission may direct a natural gas company to extend its facilities and sell gas to a distribution company only "if the Commission finds that no undue burden will be placed upon such natural-gas company thereby."

Here, the Commission found that service to Petitioner under its proposals would place an undue burden upon Michigan Wisconsin and its other customers and that service to Petitioner under those conditions would not be necessary or desirable in the public interest. If the Commission had stopped at that point, therefore, Petitioner would simply have been denied service as not having satisfied the statutory requirements of Section 7(a). However, the Commission further found that the sale of gas to Petitioner at Menomi-

nee under the ACQ-1 Rate Schedule would not place an undue burden on Michigan Wisconsin and would be in the public interest. It was only on that basis that the Commission was able to find the service necessary or desirable in the public interest under the standards of Section 7(a).

Petitioner's claim of discrimination cannot properly arise because its only right to service from Michigan Wisconsin is expressly dependent upon Petitioner's purchasing gas at Menominee under Michigan Wisconsin's ACQ-1 Rate Schedule. Accordingly, if Petitioner's theory were adopted that Michigan Wisconsin must construct additional facilities in the Upper Peninsula in order to avoid discrimination, the Commission would have to deny service to Petitioner entirely since the Commission has already found under Section 7(a) that such a requirement would place an undue burden upon Michigan Wisconsin and its other customers.

In sum, Petitioner cannot rely upon an order of the Commission under Section 7(a) as the source of its right to service from Michigan Wisconsin and at the same time ask the Court to set aside the conditions upon which the Commission found such service to be necessary or desirable in the public interest.

CONCLUSION

This petition does not even remotely meet the standards for granting certiorari. The order involved represents a routine exercise of the administrative judgment which is expressly vested in the Commission by the Natural Gas Act. Upon review of the record and careful consideration of Petitioner's contentions, the Court below found that the Commission's judgment

was appropriate and supported by the evidence. The petition for certiorari should be denied.

Respectfully submitted,

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No. 368

In the Supreme Court of the United States

OCTOBER TERM, 1961

MICHIGAN GAS AND ELECTRIC COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION,
MICHIGAN WISCONSIN PIPE LINE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the Federal Power Commission (R. 339-397) is reported at 22 F.P.C. 775. The order of the Commission denying rehearing (R. 428-447) is reported at 22 F.P.C. 1157. The opinion of the Court of Appeals (Pet. App. 1a-5a) is reported at 290 F. 2d 374. The order of the Court of Appeals denying a rehearing en banc (Pet. App. 1c) is unreported.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 1b) was entered on April 20, 1961. A timely petition for rehearing en banc was denied on June 1, 1961 (Pet. App. 1c). The petition for a writ of certiorari was filed on August 30, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and Section 19 (b) of the Natural Gas Act, 15 U.S.C. 717r (b).

QUESTION PRESENTED

Whether there is a reasonable basis for the finding of the Commission of no undue discrimination in the sale of gas to petitioner.

STATUTE INVOLVED

Section 4 (b) of the Natural Gas Act of June 21, 1938, c. 556, 52 Stat. 822, 15 U.S.C. 717c (b), provides:

> No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

STATEMENT

Petitioner, Michigan Gas and Electric Company, distributes manufactured gas in three communities of the Upper Peninsula of Michigan, and has franchises to distribute natural gas in these communities and four other Upper Peninsula communities (R. 151-155). Additionally, in a portion of the Lower Peninsula of Michigan, it distributes natural gas which it purchases from Michigan Wisconsin Pipe Line Company (R. 151-153). Michigan Wisconsin is an interstate pipeline company operating a pipeline system extending from Texas to Michigan. It obtains gas from producers in Texas, Oklahoma, Kansas, and from an affiliated pipeline company which purchases gas in Louisiana, and sells to distributors in Missouri, Iowa, Illinois, Wisconsin, and Michigan.

Michigan Wisconsin and Midwestern Gas Transmission Company, another pipeline company, had organized a major project to import Canadian gas and transport it to Wisconsin. The present proceedings before the Federal Power Commission were begun by Midwestern's application for a certificate of public convenience and necessity authorizing it to construct and operate pipeline facilities for the importation of 204,000 Mcf per day of natural gas from Canada (R. 339).

Michigan Wisconsin, in turn, requested a certificate authorizing expansion of its system, involving the construction of about 376 miles of new pipeline plus related facilities which altogether would cost an estimated $24 million, so that it could purchase this

gas from Midwestern and re-sell it to both new and existing customers (R. 341-342). Included in Michigan Wisconsin's proposal was the construction of a 97-mile pipeline from Marshfield, Wisconsin (the eastern terminus of Midwestern's line), eastward to a point near Appleton, Wisconsin, where it would connect with Michigan Wisconsin's existing system (R. 207, 341). From this new line, Michigan Wisconsin further proposed to construct a 96-mile line northward, at a cost of over $4 million, which would terminate at Menominee, Michigan, in the Upper Peninsula just over the Wisconsin border (R. 207, 342). Michigan Wisconsin intended to sell gas at Menominee to its affiliate, Michigan Consolidated Gas Company, at the uniform ACQ-1 rate, and Consolidated in turn would construct the necessary facilities to distribute the gas to various communities in the Upper Peninsula (R. 342, 371).[1]

Petitioner intervened in the proceedings before the Commission, seeking to have Michigan Wisconsin sell gas to it for distribution in the Upper Peninsula, rather than to Consolidated (R. 370). Petitioner

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[1] Prior to its proposal to sell to Consolidated, there had been negotiations between Michigan Wisconsin and the petitioner concerning the sale of gas to the latter for distribution in the Upper Peninsula. It was testified by an official of Michigan Wisconsin (R. 55-58) that Michigan Wisconsin offered either to construct the facilities from Menominee and sell to the petitioner at the various city gates at a rate of 52¢ per Mcf, or to sell to the petitioner at Menominee at the uniform system rate of 42.3¢ per Mcf with the petitioner building the facilities for city gate delivery. These alternative offers were rejected by the petitioner and negotiations subsequently terminated (R. 57-58; cf. R. 167).

also insisted that the sale of gas to either distributing company (petitioner or Consolidated) at Menominee, rather than at the various city gates in the Upper Peninsula, at the uniform ACQ-1 rate paid by all other customers of Michigan Wisconsin, would discriminate against the distributing company (R. 373, 374).

Petitioner submitted two alternative proposals for the elimination of this alleged discrimination. First, it suggested that, if it were to pay the uniform rate, Michigan Wisconsin should construct over half of the transmission facilities from Menominee to the several communities in the Upper Peninsula and petitioner would construct the remaining facilities (R. 373).[2] In the alternative, petitioner proposed that it would construct all of the facilities north of Menominee but would pay Michigan Wisconsin only 37½¢ per Mcf rather than the standard ACQ-1 rate of 42.3¢ (R. 374).

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[2] This proposal was based on Michigan Wisconsin's so-called "10-cent formula". The Commission described this formula as follows: "Under the 10-cent formula, which has been applied by Michigan Wisconsin to test whether to construct laterals to new markets along its route, the operating costs are computed on the basis of 15 per cent of the estimated cost of constructing the lateral and appurtenant facilities and when thus computed the operating costs shall not exceed 10 cents per Mcf on the basis of the estimated annual firm sales in the third year. Michigan Gas contends that the 10-cent formula is properly applicable to these facilities since its purpose is to make possible laterals that would be infeasible for either party to construct entirely by itself" (R. 373). The Commission rejected petitioner's contention that the "10-cent formula" was applicable, pointing out that "in general this formula is applicable to relatively short laterals" (R. 376).

The Commission granted certificates to Midwestern and Michigan Wisconsin authorizing the importation of the Canadian gas and the construction of the proposed facilities. It also granted petitioner's application that the sale of gas for distribution in the upper Peninsula be to the petitioner rather than to Michigan Consolidated (R. 376).[3] However, the Commission rejected both of the alternative proposals submitted by petitioner for the distribution in the Upper Peninsula, finding that they would impose a burden on Michigan Wisconsin's other customers and involve discrimination against them (R. 374-378). Contrary to the assertions made in this Court (Pet. pp. 2, 10-12, 17-19), the Commission also found that there was no undue discrimination against petitioner in connection with Michigan Wisconsin's proposal to sell gas at Menominee at the uniform ACQ-1 rate, with petitioner constructing the necessary facilities from there to the Upper Peninsula communities (R. 376).

Petitioner sought a rehearing before the Commission, asserting error in the decision authorizing sale to it at Menominee at the standard ACQ-1 rate (R.

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[3] The Commission's grant of the application, however, was conditioned upon the petitioner's securing a ten-year contract covering the sale of gas to the Cleveland Cliffs Iron Company, the largest industrial enterprise in the Upper Peninsula (R. 371, 378). It was found by the Commission that, for natural gas service to the Upper Peninsula to be economically feasible, Cleveland Cliffs would have to be a customer for the gas, as that company itself would consume over half of the gas delivered in the Upper Peninsula (R. 371-372, 378, 436).

397-426). The Commission denied the application for rehearing (R. 428-447), reiterating its finding that there was no undue discrimination against petitioner (R. 435, 440). The Court of Appeals affirmed, holding that the "findings of the Commission are adequately supported by the record" (Pet. App. 1a-5a).

ARGUMENT

The question in this case is not, as petitioner has framed it (Pet. pp. 2, 10-12, 17-19), whether the Commission, after rejecting specific proposals submitted for the elimination of admitted undue discrimination, must then undertake on its own to eliminate such discrimination. Contrary to petitioner's assumption, the Commission expressly found in this case that there was *no* undue discrimination. Moreover, even if petitioner were to attack this ultimate finding, the existence of undue discrimination is peculiarly for the Commission's judgment, and the Commission did not act arbitrarily in making its determination here. Also, it is settled that the Commission may permit somewhat different treatment by pipeline companies of distributors, either by making the distributors pay higher rates or constructing some of the pipeline facilities themselves, where, as here, the geographical locations of the distributors justify such differences. There is therefore no occasion for further review by this Court.

1. Petitioner insists that the issue is whether the Federal Power Commission must on its own motion

devise means to rectify a discriminatory condition in the distribution of natural gas, or need it merely rule on specific proposals submitted by an interested party for the elimination of such discrimination. The presence of this issue would depend upon an affirmative finding of discrimination, or at the very least on an absence of any finding with respect to allegations of undue preference. However, such is not this case.

The Commission expressly found that the sale of gas at the standard ACQ-1 rate to the petitioner at Menominee, rather than at some place farther north in the Upper Peninsula, involved no undue discrimination. It stated (R. 376):

> Thus, providing for purchases by Michigan Gas under the ACQ-1 Rate Schedule and construction by it of the necessary Upper Peninsula facilities does not discriminate against that Company.

The Commission also said (R. 375-376):

> Michigan Consolidated could have rendered the service to the Upper Peninsula on a feasible basis while purchasing from Michigan Wisconsin under the latter's Rate Schedule ACQ-1, without any special concessions from Michigan Wisconsin having adverse effects on the other customers that company serves; and we think that Michigan Gas should reasonably be held to the same requirement.

And, in denying petitioner's application for rehearing, the Commission reaffirmed its conclusion of no undue discrimination, stating that requiring the petitioner to purchase gas at the standard rate at Men-

omince was a "reasonable requirement" (R. 435) and was "fair to all concerned" (R. 440).[4]

2. Furthermore, even if petitioner were to attack the Commission's specific finding of no undue preference, there would be no occasion for review by this Court. Judicial review of an order of the Power Commission under the Natural Gas Act is, of course, limited. *Power Com'n.* v. *Hope Gas Co.*, 320 U.S. 591, 602-603. The present proceeding concerned the issuance of a certificate of public convenience and necessity, and "in determining whether certificates of convenience and necessity shall be granted * * * the Commission has been entrusted with a wide range of discretionary authority." *Federal Power Com'n.* v. *Transcontinental Gas Corp.*, 365 U. S. 1, 7, quoting *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241. See also *Panhandle Eastern Pipe L. Co.* v. *Federal Power Com'n.*, 236 F. 2d 289 (C.A. 3). It is also well established that questions of undue preference and discrimination are matters for the judgment of the Commission. *Michigan Consol. Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F. 2d 784, 789 (C.A. 6);

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[4] The Commission's action in the Baraboo matter, far from supporting petitioner (Pet. p. 18), precisely accords with the order in this case. Here the Commission refused to order all Michigan Wisconsin customers to make excessive contributions toward service to communities remote from the supply of gas; in the case of Baraboo, the Commission refused to permit Michigan Wisconsin to undertake, at the ultimate expense of the other customers, excessive contributions for such service. *Northern Natural Gas Company and Michigan Wisconsin Pipeline Company*, F.P.C. Opinion No. 345, issued June 28, 1961 (not yet reported).

Michigan Consol. Gas Co. v. *Federal Power Com'n.*, 203 F. 2d 895, 901 (C.A. 3). Cf. *Texas & Pac. Railway* v. *Interstate Com. Com.*, 162 U.S. 197, 238; *Board of Trade* v. *United States*, 314 U.S. 534, 546. In the circumstances of this case, it cannot be said that the Commission acted arbitrarily or abused its power in concluding that the petitioner should take delivery at Menominee at the standard rate.

Petitioner's contention that the Commission's order is unduly discriminatory is based on its view that, since other customers of Michigan Wisconsin allegedly have gas delivered at the "city gates" or under the so-called "10-cent" formula (footnote 2, *supra*, p. 5) and pay the uniform ACQ-1 rate, petitioner should also have delivery at the "city gates" or under the formula, and at the same price, regardless of the different circumstances present in its situation. Petitioner goes on to argue that, if it is not given delivery at some point beyond Menominee in the Upper Peninsula, then it should pay less for gas than everyone else.

The answer to these claims of discrimination is found in the Commission's reasons for rejecting petitioner's specific proposals requesting preferred treatment for itself. As to the proposal that Michigan Wisconsin should construct a pipeline from Menominee north, either to the several Upper Peninsula communities or under the "10-cent" formula, the Commission found that this would unfairly burden Michigan Wisconsin's other customers. This is because they would have to pay the costs, in terms of

higher rates, for further expansion of Michigan Wisconsin's system into a new and distant locality, where the economic feasibility of natural gas service was not completely certain (footnote 3, *supra*, p. 6). With respect to extending Michigan Wisconsin's pipeline beyond Menominee,[5] pursuant to the "10-cent" formula, the Commission found that this formula "is applicable to relatively short laterals" and that the "maximum distance Michigan Wisconsin has built under it in the past is a line some 17.5 miles long at a cost of approximately $300,000" (R. 376). These findings are amply supported by the record (see, *e.g.*, R. 44-55, 431-432).

Similarly, with respect to petitioner's alternate proposal that, if it were to take delivery at Menominee, it should pay less than the standard ACQ-1 rate paid by all other customers, the Commission found that this "would be discriminatory to Michigan Wisconsin's existing customers" (R. 377); acceptance of petitioner's proposal that it obtain something more favorable than delivery at Menominee at the standard rate "would result in special concessions to it. Either Michigan Gas would receive the benefit of added, unjustifiable construction of facilities by Michigan Wisconsin, or Michigan Gas would receive a preferential rate not justified on the record" (R. 438-439).

The Commission explicitly pointed up the justification for requiring the petitioner to build the pipeline

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[5] It should be noted that Michigan Wisconsin was itself going to build the 96-mile line to Menominee, as part of an expansion system involving 376 miles of new pipeline and $24 million.

facilities north of Menominee, and pay the uniform rate (R. 377-378):

> Finally, there are certain areas of this country which are situated in unfortunate geographical locations in relation to the availability of natural gas. It is no fault of these areas that they happen to be victims of geography. On the other hand, the existing customers can hardly be required to pay excessive costs just to make certain that the areas which are located a great distance from the source of supply may have the benefits of natural-gas service. The hard realities of such circumstances are that those areas must be willing to pay the costs associated with obtaining natural-gas service or be satisfied with other fuels which may be less desirable but which may be more economical to purchase than natural gas.

In sum, the reasoning of the Commission shows that its finding of no undue discrimination had a rational basis. The Court of Appeals reviewed the record and held that the Commission's decision was not arbitrary or unsupported. There is no need or occasion for further review.

3. Finally, it should be pointed out that Commission orders have been upheld even though they have resulted in different treatment of natural gas distributors (by requiring some to pay higher rates or to construct pipeline facilities themselves) because of differing geographical locations. This Court has indicated that where a pipeline is a single integrated project, and would not have been constructed but for the cities at its farthest extremities, then it is fair

to allocate transmission costs evenly among those along the entire pipeline, whereas if the extensions to farther cities are separate projects, not dependent upon earlier customers nearer the source, it would be fair to make the customers at the new ends pay for the extra costs of the additional mileage. See *Colorado Interstate Co.* v. *Federal Power Commission*, 324 U.S. 581, 590-592. The Commission, in the instant case, found (R. 376-377, 434) that the project for the Upper Peninsula was separate and distinct from the operations of the pipeline company in Wisconsin, justifying the different treatment.[6]

Other cases approving higher charges to distributors farther from the source of the gas include *Interstate Power Co.* v. *Federal Power Commission*, 236 F. 2d 372 (C.A. 8), certiorari denied, 352 U.S. 967 (where it was held that uniform rates throughout the pipeline system were discriminatory and that distributors at a greater distance from the source should pay more), and *Minneapolis Gas Company* v. *Federal Power Commission*, 278 F. 2d 870 (C.A.

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[6] This is the distinction between the present case and *Michigan Wisconsin Pipe Line Co.*, 9 F.P.C. 127, relied on by petitioner. As to the earlier case, the Commission stated (R. 434):

> That case presented the question of whether Michigan Wisconsin should be required to construct relatively short service laterals off its main transmission line to render city-gate deliveries, a wholly different situation from that presented here, involving the extension of transmission facilities into a new market region which, by reason of its peculiar characteristics, lacks the stability of existing markets.

D.C.), certiorari denied, 364 U.S. 891 (upholding an order requiring distributors on certain lines to make contributions to the initial cost of the pipeline). See also the recent discussion of this problem by Mr. Justice Reed in *Battle Creek Gas Company* v. *Federal Power Commission*, 281 F. 2d 42, 45-47 (C.A. D.C.).

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 368

MICHIGAN GAS AND ELECTRIC COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION, MICHIGAN WISCONSIN PIPE LINE COMPANY, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

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1. Neither the Commission nor Mich Wis deny the general importance of the question presented as set out in the Petition. Instead, their principal contention in opposition to the granting of certiorari is that the Commission explicitly found that requiring Michigan Gas to take gas for the Upper Peninsula at the pipeline (Menominee) at the same rate paid by all other customers of Mich Wis receiving delivery over

branch lines constructed by Mich Wis in accordance with its branch-line extension practice[1] does not result in unlawful discrimination against Michigan Gas and the Upper Peninsula. Accordingly, they urge that the question as set out in the Petition is not in fact presented.

In so contending, both the Commission and Mich Wis set out various citations to the Commission's orders where the Commission assertedly made such findings. But, properly read, these citations and the bob-tailed excerpts quoted therefrom fall far short of containing the finding now claimed by the Commission and Mich Wis. To the contrary, when read in the context as used and obviously intended by the Commission at the time it issued these orders, these materials make clear, as pointed out in the Petition, that in issuing the orders here involved, the Commission had assumed that rejection of the alternatives suggested by Michigan Gas for elimination of the discrimination—the existence of which the Commission did not deny—terminated its duty under Section 4(b) to eliminate discrimination.[2] Indeed, if the Commission had in fact

[1] Under this practice, when the branch line is regarded as part of a "project", Mich Wis constructs it all the way to the city gate and provides city-gate delivery; otherwise, Mich Wis constructs the branch line part of the way to the city gate as determined by its so-called "10-cent" formula and provides delivery at the point where Mich Wis' construction terminates.

[2] Mich Wis concedes that such Commission action in these circumstances would constitute clear error (Mich Wis Br., pp. 14-15):

> Few would disagree with the proposition raised by Petitioner in its "Question Presented" that, when confronted with discrimination, the Commission's responsibility to eliminate that discrimination is not limited or measured by the suggestions of the parties.

found that there was no unlawful discrimination, there would have been no occasion for the extended discussion of Michigan Gas' suggestions for its elimination that appears in the Commission's orders.

While the excerpt reproduced by the Commission (Com. Br., p. 8) to the effect that

> Thus providing for purchases by Michigan Gas under the ACQ-1 Rate Schedule and construction by it of the necessary Upper Peninsula facilities does not discriminate against that Company,

would appear, when read in isolation, to support the Commission's present position, it should be noted that this language is used in the Commission's opinion as the concluding sentence of a paragraph which reads in its entirety as follows:

> We thus reject the two alternatives advanced by Michigan Gas. As to the ACQ proposal based on the 10-cent formula, apart from the question of whether we have authority to require Michigan Wisconsin to construct the facilities involved, in general this formula is applicable to relatively short laterals. The maximum distance Michigan Wisconsin has built under it in the past is a line some 17.5 miles long at a cost of approximately $300,000. Also, Michigan Wisconsin would invest some $2,377,194 in facilities in the line from Waupaca to Menominee for additional capacity solely to provide service to the Upper Peninsula. *Thus*, providing for purchases by Michigan Gas under the ACQ-1 Rate Schedule and construction by it of the necessary Upper Peninsula facilities does not discriminate against that company. (Italics supplied; footnote omitted)

In contrast to the impression created by the language as quoted by the Commission—an impression

sharply enhanced by the omission of any indication of prior excisions—this excerpt when read in context, is plainly nothing more than only one link in the fallacious chain of reasoning used by the Commission in this case.[3] Read as concluding sentence of the paragraph just set out, the excerpt quoted by the Commission, particularly the introductory "Thus", makes clear the Commission's invalid assumption that its duty with regard to the elimination of unlawful discrimination was discharged with rejection of these suggestions.

The other excerpts quoted by the Commission similarly do not contain the finding, explicit or otherwise, now claimed by the Commission. The context of "'reasonable requirement' (R. 435)" (Com. Br., p. 9) shows the same unwarranted assumption. The quotations from R. 375-376 and from R. 440 (Com. Br., pp. 8, 9) are both used in the Commission's opinion—in contrast to the purpose for which they are now cited—in connection with the Commission's reasons for selecting Michigan Gas over Michigan Consolidated to distribute the natural gas allocated for the Upper Peninsula. Indeed, to the extent that the Commission does treat the terms and conditions of service to the Upper Peninsula in these excerpts, the Commission indulged in the further erroneous reasoning that the willingness of the Mich Wis' sister company, Michigan Consolidated, to take the gas at Menominee at the ACQ-1 Rate justifies the imposition of the same terms

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[3] While Mich Wis' reproduction of this excerpt (Mich Wis Br., p. 12) contains asterisks to indicate an omission, it omits, in addition, the introductory, highly significant "Thus", thereby distorting even more the actual intent and meaning of the quoted language.

upon Michigan Gas without reference to whether unlawful discrimination results therefrom.[4]

The same confusion between the unlawful discrimination and Michigan Gas' alternative suggestions also permeates not only the opinion of the court below (see particularly the language quoted at Mich Wis Br., p. 12) but the Commission's effort in its brief filed in this Court to show that its asserted, but non-existent, finding of no unlawful discrimination is amply supported (Com. Br., pp. 9-12):

> As to [Michigan Gas'] proposal that Michigan Wisconsin should construct a pipeline from Menominee north, either to the Upper Peninsula communities or under the "10-cent" formula, the Commission found that this would unfairly burden Michigan Wisconsin's other customers. (Com. Br., p. 10)
>
> * * *
>
> Similarly, with respect to petitioner's alternative proposal that, if it were to take delivery at Menominee, it should pay less than the standard ACQ-1 rate paid by all other customers, the Commission found that this "would be discriminatory to Michigan Wisconsin's existing customers" (R. 377) * * * (Com. Br., p. 11)

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[4] The willingness of an affiliate of a pipeline company to acquiesce in discrimination patently does not justify the imposition of comparable discriminatory treatment upon a nonaffiliated smaller customer. For whereas in view of the intercorporate relationship, an affiliate's acquiescence in unlawful discrimination is totally offset by the benefits therefrom received by its sister, subjecting a nonaffiliated customer to comparable discriminatory treatment allows full scope for the abuses which the prohibition of discrimination was designed to eliminate. Cf. *Mississippi River Fuel Corporation* v. *Federal Power Commission*, 252 F. 2d 619, 622 (1957), certiorari denied, 355 U.S. 904 (1957).

As shown in the Petition (at p. 17), the rejection of Michigan Gas' suggestions for elimination of unlawful discrimination has no bearing upon the existence of unlawful discrimination—a matter separate and distinct from the question as to the proper steps to be taken to eliminate the discrimination. Accordingly, since the Petition clearly demonstrates that the Commission's order results in unlawful discrimination against the Upper Peninsula (Pet. pp. 14-16), it is apparent that the question as to the duty imposed upon the Commission by Section 4(b) of the Natural Gas Act to eliminate unlawful discrimination is in fact presented here.[5]

2. In urging against certiorari here, both the Commission and Mich Wis further claim that the question presented is one peculiarly with the Commission's expertise, particularly since the Commission's action was taken in a proceeding involving the issuance of a certificate of public convenience and necessity (Com. Br., pp. 9-10; Mich Wis Br., pp. 16-17). The difficulty with these arguments, however, is that they are premised on Respondents' unfounded claim,

[5] In other respects as well the Commission and Mich Wis have, by omission or otherwise, given a wholly unwarranted cast to the Commission's orders and the record evidence. Extended discussion of each of these would unduly extend this brief. Illustrative is their treatment of the Mich Wis-Michigan Gas negotiations prior to Mich Wis' filing its proposal to sell gas for the Upper Peninsula to its sister company, Consolidated. In summarizing these negotiations, the Commission and Mich Wis leave the impression that they were terminated upon Michigan Gas' rejection of Mich Wis' offer to provide city-gate delivery at a 52-cent rate (Com. Br., p. 4, fn. 1; Mich Wis Br., p. 5). The facts are, as shown in the Petition (at p. 6), that subsequent thereto, Mich Wis made a further offer of a 46-cent rate for city-gate delivery and Michigan Gas was on the verge of acceptance when the offer was abruptly withdrawn by Mich Wis.

just discussed, that the Commission found that there was no unlawful discrimination.

Moreover, the cases relied on by the Commission and Mich Wis are patently inapplicable. A Commission determination of the public convenience and necessity under Section 7(e) of the Act bears no resemblance to its failure to discharge the duty imposed upon it by Section 4(b) not to sanction unlawful discrimination. Whereas the public interest determination under Section 7(e) involves balancing of complex factors within the Commission's special expertise, none of these considerations are in any way relevant to the delineation, under Section 4(b), of the Commission's duty vis à vis unlawful discrimination. Cf. *Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263 (1960).

3. The Commission seeks to support its orders independently of the asserted finding of no discrimination by attempting to demonstrate that "because of differing geographical locations" its orders were reasonable and did not in fact result in unlawful discrimination against the Upper Peninsula (Com. Br., p. 12). On the same basis, the Commission also claims that the 1950 *Michigan Wisconsin* case[6] has no bearing in the present case (Com. Br., p. 13, fn. 6).

The claim that the higher costs of gas delivered in the Upper Peninsula is justified by the "extra costs of the additional mileage" needed to reach the Upper Peninsula (Com. Br., p. 13) ignores the hard facts of the operation of Mich Wis' pipeline system. There is no zoning or zone rates on the Mich Wis system. All of its customers pay the same

[6] *Michigan Wisconsin Pipe Line Co.*, 9 F.P.C. 127 (1950).

ACQ-1 rate and (other than Michigan Gas for the Upper Peninsula) receive delivery of their gas at the end of branch lines constructed by Mich Wis in accordance with Mich Wis' branch-line extension practice. This is the case *regardless of the customer's location on the Mich Wis system.* Indeed, many of these customers are substantially further from Mich Wis' sources of gas supply than is the Upper Peninsula from Marshfield where Mich Wis takes delivery of the Canadian gas from Midwestern. If the Commission's argument had any validity, these customers would also be required to pay the "extra costs of the additional mileage".

Nor do considerations of "geographical location" render the 1950 *Michigan Wisconsin* case inapplicable. In that case, the Commission did not even refer to, let alone place critical weight upon, the length of the branch lines involved. In addition, the Commission's basic holding there was simply that unlawful discrimination would result under Mich Wis' proposal that the same rate be paid for both pipeline and city-gate service. See 9 F.P.C. at 135. However, if the 1950 *Michigan Wisconsin* case were limited as now claimed by the Commission, the unlawful discrimination against the Upper Peninsula here would be all the more flagrant. If unlawful discrimination results from providing only pipeline service as against city-gate service where the customers receiving pipeline service would have to bear only comparatively slight additional costs to build the necessary branch lines (as the Commission claims it held in the 1950 *Michigan Wisconsin* case), then the obviously higher costs involved in the Commission's requirement that Michigan Gas construct and operate the extensive branch line needed to provide service

to the Upper Peninsula results in discrimination even more invidious against the Upper Peninsula.

4. Finally the Commission seeks to support its orders by quoting from its opinion as follows (Com. Br., p. 12):

> Finally, there are certain areas of this country which are situated in unfortunate geographical locations in relation to the availability of natural gas. It is no fault of these areas that they happen to be victims of geography. On the other hand, the existing customers can hardly be required to pay excessive costs just to make certain that the areas which are located a great distance from the source of supply may have the benefits of natural-gas service. The hard realities of such circumstances are that those areas must be willing to pay the costs associated with obtaining natural-gas service or be satisfied with other fuels which may be less desirable but which may be more economical to purchase than natural gas. (R. 377-378)

But, as already made clear, neither Michigan Gas nor the Upper Peninsula are asking the existing customers to pay *excessive* costs to assure service to the Upper Peninsula. Nor are Michigan Gas and the Upper Peninsula unwilling to pay the *reasonable* costs associated with natural gas service to that area. Michigan gas and the Upper Peninsula seek only *nondiscriminatory* treatment, i.e., treatment no worse as well as no better than that accorded other customers of Mich Wis.

As pointed out earlier, Mich Wis' other customers receive service over branch lines constructed for them by Mich Wis in accordance with its branch-line extension practice. Many of these customers are so situated

geographically or marketwise that, absent construction by Mich Wis of branch lines in accordance with its branch-line extension practice, they could not have had the benefits of natural gas service. As an existing customer of Mich Wis in its operations in the Lower Peninsula, Michigan Gas has, along with other customers of Mich Wis, borne the costs incurred by Mich Wis in constructing these lines without question. Michigan Gas asks no more with respect to service for the Upper Peninsula.[7]

Moreover, as the Commission found in *Michigan Wisconsin Pipe Line Co.*, 21 F.P.C. 552, 558 (1959), the very purpose of the branch-line extension practice was "to make possible laterals that would be infeasible for either party to construct entirely by itself". Here, contrary to Mich Wis (Mich Wis Br., p. 10), there is no finding by the Commission that the project is feasible for Michigan Gas if it alone were to incur the $8,000,000 cost of constructing the entire branch line from Menominee. In these circumstances, the effect of the Commission's order is to deny to Michigan Gas and the Upper Peninsular the means—inherent in Mich Wis' branch-line extension practice and provided for in Mich Wis' rates—for providing urgently needed

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[7] While, as pointed out by the Commission (Com. Br., p. 4) and Mich Wis (Mich Wis Br., pp. 8, 16) Mich Wis' share of the costs of the branch line to the Upper Peninsula would, under its 10-cent formula, have aggregated some 4.5 million dollars, the Commission's rejection of Michigan Gas' suggestion in connection therewith rendered that figure no longer meaningful. Until the Commission develops an appropriate formula for eliminating the unlawful discrimination, there is no way of ascertaining the cost to be borne by Mich Wis. Clearly, however, it will be less than 4.5 million dollars.

natural gas service to the Upper Peninsula on a basis entirely fair to all concerned.[8]

CONCLUSION

For these reasons as well as those set out in the Petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted.

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[8] Mich Wis further urges that the Commission's actions here are supportable under the provisions of Section 7(a) of the Act. The short answer to this argument is that inasmuch as the Commission did not rely upon Section 7(a) in issuing its orders, settled principles preclude affirmance based on that Section now. See, e.g., *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943). Section 7(a) is, in any case, inapplicable here for the reason, among others, that Mich Wis' application here expressly proposed to provide service to the Upper Peninsula and Michigan Gas did not apply for service under Section 7(a). Rather Michigan Gas, as an existing customer of Mich. Wis. intervened in opposition to the terms and conditions on which Mich Wis proposed to provide service in the Upper Peninsula. Hence, there is no question here as to an extension of service contrary to the wishes of the pipeline; rather the question concerns the terms and conditions on which to authorize a service proposed by the pipeline to an existing customer and as to such question, Section 4(b) prohibiting unlawful discrimination, not the proviso in Section 7(a), is controlling.